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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-202622

DATE: April 15, 1981

MATTER OF: Taylor Construction

DIGEST:

DLG 06538
[Protest Against 8(a) Procurement]

Determination whether to procure under section 8(a) of the Small Business Act, including assessment of impact of section 8(a) award upon other small business firms, is matter for contracting agency and SBA and will not be reviewed by GAO absent showing of fraud or bad faith on part of Government officials.

(Taylor Construction (Taylor) protests the Corps of Engineers' planned award of certain construction projects through the Small Business Administration's (SBA) 8(a) program rather than through competitive bidding. Taylor asserts that such awards would be inconsistent with SBA's policies prohibiting section 8(a) contracting where a small business concern may suffer major hardships.)

(According to Taylor, the Corps of Engineers has competitively awarded numerous small construction projects to Taylor over the last few years and, as a result, Taylor has grown to rely upon these contracts for a substantial part of its income.) Taylor now understands that the work encompassed by solicitation DACA01-81-r-0022, for Miscellaneous Industrial Waste Treatment at Anniston Army Depot, Bynum, Alabama, as well as work on a Hazardous Material Control Facility at that same location, will be awarded without competition through the 8(a) program. (Taylor contends that under Chapter III of the SBA Handbook of Policies and Procedures SBA may not accept these procurements for 8(a) award where other small business concerns have been dependent upon the work for a significant portion of their sales.)

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Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (Supp. III 1979), authorizes SBA to enter into contracts with any Government agency having procurement powers. The SBA is empowered to select certain procurements which it certifies that 8(a) program participants are competent to perform. The contracting officer of the procuring agency is authorized to let the contract to SBA upon such terms and conditions as may be agreed upon between SBA and the procuring agency. 53 Comp. Gen. 143 (1973). Therefore, we have recognized that the determination to initiate award through section 8(a) is a matter for the contracting agency and SBA to decide, Echols Electric, Inc., B-194123.2, April 6, 1979, 79-1 CPD 242, and in view of the broad discretion vested in the contracting officer and the SBA, we do not review determinations to procure through the 8(a) program unless it appears that there was fraud or bad faith on the part of Government officials. American Laundry, 58 Comp. Gen. 672 (1979), 79-2 CPD 49.

As to the effect an 8(a) contract has upon other small business firms, the courts in recognizing the validity of the 8(a) program have specifically noted that it necessarily operates to the disadvantage of other concerns to some extent. Ray Baillie Trash Hauling, Inc., v. Kleppe, 477 F.2d 696 (5th Cir. 1973). We do recognize that as a matter of policy SBA may find a procurement unsuitable for the 8(a) program based on guidance such as that contained in the SBA Handbook of Policies and Procedures. However, there is no regulatory requirement that SBA do so, and this Office will not review alleged violations of SBA's internal guidelines implementing the 8(a) program absent fraud or bad faith. See Jet Services, Inc., B-199721, March 11, 1981, 81-1 CPD _____. Here, no showing of fraud or bad faith has been made.

Since the protest concerns a matter which is not subject to our review, we see no purpose to be served by honoring Taylor's request for a conference. The protest is dismissed.

Harry R. Van Cleve

Harry R. Van Cleve
Acting General Counsel